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No. 86-312

In the Supreme Court of the United States

OCTOBER TERM, 1986

LILLIAN WIGGINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that a use immunity order entered under the federal immunity statute, 18 U.S.C. 6002-6003, was inadequate to displace her Fifth Amendment privilege against compulsory self-incrimination.

1. On October 30, 1984, petitioner was served with a subpoena duces tecum to appear before the federal grand jury in the District of Columbia. The subpoena called for petitioner to produce tape-recordings of conversations between herself and other persons pertaining to the operations of the District of Columbia Lottery Board. Upon petitioner's motion, the district court quashed the subpoena on the ground that her act of producing the tapes would be incriminating because it would convey information not already known to the government about the existence of the tapes (Pet. App. 11a-17a).

On April 29, 1985, petitioner was again served with a grand jury subpoena demanding production of the tapes. When petitioner moved to quash this second subpoena, the government moved under 18 U.S.C. 6003 for an order

compelling her to produce the tape-recordings under a grant of use immunity. The district court again quashed the subpoena, finding that the prospective grant of immunity would not protect petitioner to the same extent as the privilege against compulsory self-incrimination (Pet. App. 8a-10a).

On May 20, 1986, the court of appeals reversed the order quashing the subpoena (Pet. App. 1a-7a). The court noted that "the scope of immunity afforded by § 6002 is, by definition, whatever is necessary to protect the witness's privilege against self-incrimination" (*id.* at 6a). Therefore, the court held, Section 6003 "requires the order to testify to be issued without inquiry as to what that scope might be, leaving that question for subsequent suppression hearings" (Pet. App. 6a). For that reason, the court added, if petitioner's privilege in the act of production "cannot be protected without excluding the contents of the tapes (a point on which we express no opinion) the District Court has the authority to prevent the government from referring to or introducing those contents. But it does not have authority to prevent the government from gaining access to the tapes" (*ibid.*). Accordingly, the court of appeals instructed the district court to grant the government's motion compelling petitioner to produce the tapes (*id.* at 7a).

2. Petitioner contends (Pet. 5-9) that the immunity granted under 18 U.S.C. 6002 was not coextensive with her privilege against compulsory self-incrimination, and that the court of appeals therefore should not have ordered her to produce the tape-recordings. This Court, however, has repeatedly held that the immunity granted by the federal use immunity statute is sufficient to displace the privilege against compulsory self-incrimination and thus to justify an order compelling the immunized witness to comply with a subpoena. See *United States* v. *Doe,* 465 U.S. 605, 617 n.17 (1984); *Pillsbury Co.* v. *Conboy,* 459

U.S. 248, 254-255 (1983); *United States* v. *Apfelbaum*, 445 U.S. 115, 123 (1980); *Kastigar* v. *United States*, 406 U.S. 441, 453-459 (1972).

Although petitioner claims (Pet. 7) that the immunity conferred by Section 6002 is not always coextensive with the witness's Fifth Amendment privilege and that the courts are not restricted to a ministerial role in the immunity process, this Court has held to the contrary. See *United States* v. *Doe*, 465 U.S. at 614-615, 616; *Pillsbury Co.* v. *Conboy*, 459 U.S. at 254-255 & n.11; *Kastigar* v. *United States*, 406 U.S. at 453. As the court of appeals correctly noted, the use immunity statute grants whatever protection is necessary to satisfy the constitutional requirements. If the government makes improper use of the immunized statements or conduct of the witness, the subsequent proceedings against the witness may be challenged on the ground that they are tainted by that improper use. See *Kastigar*, 406 U.S. at 460-462. We do not believe that the use of the tape-recordings against petitioner will prove to be improper; nonetheless, if petitioner is correct in her assertion that the tape-recordings cannot constitutionally be used against her in any way, she will be entitled to that relief after she produces them. And even if she is correct on that score, her concerns should not prohibit the government from obtaining the recordings for other legitimate purposes, such as using them against other persons.

Petitioner contends that the decision of the court of appeals in this case is inconsistent with the decision of the Seventh Circuit in *United States* v. *Porter*, 711 F.2d 1397 (1983). In that case, the Seventh Circuit expressed concern that the federal immunity statute might not grant sufficient protection against the incriminatory effects of a witness's act of producing subpoenaed materials. The court therefore required the district court to formulate a protective order that would ensure that the witness's Fifth

Amendment privilege would be fully secured. The *Porter* case, however, was decided before this Court's decision in *United States* v. *Doe, supra.* In the *Doe* case, this Court stated that the federal use immunity statute is fully effective to protect against the direct or indirect use of any incriminating feature of a witness's act of producing subpoenaed materials. See 465 U.S. at 614-615, 617 n.17. That ruling put to rest concerns of the sort expressed by the Seventh Circuit regarding the scope of the federal immunity statute.

Under the authority of the *Doe* case, there is no longer any question that a federal immunity order is sufficient, without more, to displace a witness's Fifth Amendment privilege. The court of appeals was therefore correct in directing that petitioner should be compelled to produce the tape-recordings, and it is unlikely that any other circuit would reach a contrary result.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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